PRESENCE OF THE DEFENDANT AT RENDITION OF THE VERDICT IN FELONY CASES.

I. Historical.

From the very earliest times in the administration of justice, it has been considered important, if not necessary, that the accused be present at each step in the proceeding which is to result in his condemnation or exculpation.[1] When criminal proceedings first began to take definite shape in the Germanic and Anglo-Saxon law, the presence of the accused was a necessity, which arose from the very nature of the proceedings. The procedure savored of the nature of a civil action in which the community had little or no interest; it was the case of one individual pursuing redress for a private wrong committed by the accused.[2] Obviously, the tribunal, crude as it was, could not entertain a complaint from an aggrieved party unless the presence of the accused was secured. The action, indeed, bore a close resemblance to a civil action *in personam* of the present day, and the plaintiff or accuser could have no verdict or redress unless he could produce the offending person or defendant.

But, perhaps, the methods used for determining the accused's innocence or guilt reveal the real reason why his presence was a necessity. The most common of the early methods in England was trial by "ordeal", and the defendant's presence was necessary in order that he might undergo the ordeal. Later, after the Norman Conquest, the form of trial by "battle" was developed and continued as the normal method of determining guilt through the days of Glanvill and well into the time of Bracton.[3] Here, again,

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[1]The practice of the Ancient Hebrews was to bring the accused before the tribunal when a verdict was reached. See Mendelsohn, The Criminal Jurisprudence of the Ancient Hebrews, 148.

[2]Maine, Ancient Law, 362, 365; Ames, Lectures on Legal History (lecture II) 39. It might be observed that at the very beginning, in the Anglo-Saxon law, "outlawry" was the punishment for crime, and "outlawry" was a process by which an accused was put at war with the community. See 2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 499, where it is remarked that: "He who breaks the law has gone to war with the community; the community goes to war with him."

[3]2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 603. By the efforts of the clergy trial by "ordeal" was finally abolished in England in 1219, and trial by "battle" was left. See 1 Pike, A History of Crime in England, 204.

it is evident that neither could a trial be had nor a verdict reached without the actual presence of the accused. This resulted from the nature of the trial, which was a combat, and every combat presupposed the presence of two combatants, of whom the accused was one.

Finally, on the Continent as well as in England, there is the gradual development of the jury system. The judge, at first, is a private arbitrator who is called in, casually, it seems, by the parties to settle a private quarrel. The presence of the defendant or accused is again absolutely essential: first, in order to present a dispute or case which the arbitrator is to decide; secondly, that he may be accepted, tacitly, at least, by the defendant, and so vested with power over him; and lastly, in order that the accused may elect whether to "wage battle" or defend by the aid of "oath with helpers", or, as it was later called, "suit of witnesses".[4] In England, after the reforms of Henry II, the practice grew up of the defendant putting himself "upon his country", which was proof by the verdict of a sworn inquest of neighbors.[5] The presence of the defendant is still a necessity; he must make his election between trial by "wager of battle" or trial "by his country", and his presence must continue in order that he might be made to abide by the consequences of his election.

Again, the criminal law of almost every nation begins with the accusatory system, and a pronounced characteristic of this is the absence of any procedure by which to condemn an accused who fails to appear.[6] In the nature of things a trial could not be had without the accused's presence, yet no person could have a verdict or judgment rendered against him by default in his absence. The reason for this principle must be found, if at all, in a rather sound conception of justice even among the early peoples. But

[4]See Esmein, History of Continental Procedure, 5; Maine, Ancient Law, 362. Also note, 1 *Instruction Criminelle et Procédure Pénale,* R. Garraud, 13, where the author says: *"La nécessité de la présence des parties dérive, à l'origine, du caractère même du procès, qui est une lutte simulée: tout combat suppose, en effet, la présence de deux combattants . . . Plus tard, une autre idée se mêle à la première . . . : le juge est un arbitre, il droit être accepté tout au moins tacitement, pour être regulièrement constitué dans son pouvoir."*

[5]2 Pollock & Maitland, History of English Law (2nd ed.) 610, n. 3; 1 Pike, A History of Crime in England, 206, 207.

[6]Esmein, History of Continental Criminal Procedure, 3, 5, 73; 1 *Instruction Criminelle et Procedure Penale,* R. Garraud, 13. In volume 3 of the latter work the author says, at page 478: *"Le second, c'est que la société ne peut remplir sa mission, qui est de faire vérifier la culpabilité avant de punir, si la personne poursuivie ne se présente pas."*

how crude this species of justice was is evidenced by the harsh means used to constrain the accused to submit to justice; if he did not surrender himself, he was made an "outlaw", a person who was beyond the pale of all law and who could be dealt with summarily in any fashion by any person who chanced to meet him.[7] However, the most distinctive feature of this proceeding by "outlawry" remains; namely, that it did not make a "condemned person", but rather an "outlaw".[8] Even the primitive sense of justice could not tolerate a system by which a person should have a verdict passed upon him in his absence, and so a sharp distinction was made between a "conviction" and an "outlawry".

Thus, the principle that the defendant must be personally present at his trial, and especially when a verdict or judgment is to be passed upon him, gradually entrenches itself into the law. Indeed, from the outset the common law courts have looked upon this as a necessary prerequisite to jurisdiction. Without his presence a common law court had no jurisdiction to commence a trial against a defendant, and it has become the settled practice to regard the presence of the accused at every step of the trial as necessary to the court's jurisdiction. Whether the defendant has a right to be present at the return of the verdict involves the question whether the court has jurisdiction to receive the verdict in his absence; a determination of the one will serve as an answer to the other.

In tracing the development of the right to be present, another fact of historical importance, must be remembered; this is that until comparatively recent times a defendant in a criminal case was not allowed to be represented by counsel.[9] Even after the English Bill of Rights in 1688, the administration of criminal law

[7]2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 580; Bigelow, History of Procedure in England, 348.

[8]Esmein, History of Continental Criminal Procedure, 75. It seems that at first "outlawry" was used as a punishment for crime, see note 2, but as early as the 12th Century it became a process by which merely to compel the attendance of the accused. See 2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 450, n. 2, also 459. A procedure by way of contumacy called "for banishment", a survival of the old Germanic practice, existed in France between 1200 and 1400. See Esmein, History of Continental Criminal Procedure, 73.

[9]See dictum by Brewer, J., in State *v.* Adams (1878) 20 Kan. 311, 326; also 3 Bl. Comm. *25. Also note the following in the case of State *v.* Outs (1878) 30 La. Ann. 1155, 1156: "As no counsel was allowed in that country (England) in those days to represent a prisoner, and protect him, and he could only defend himself, the courts then held that he must be in court whenever any step was taken in his cause, however insignificant or unimportant."

was oppressively severe, and it was recognized that the greatest protection to a defendant lay in requiring his personal presence at the trial. It is not surprising, therefore, to find courts, under such conditions, insisting upon a strict and technical observance of the defendant's presence at every part of the trial as a matter of right. But slowly the rigor of hard and fast rules has been relaxed, and the defendant has been afforded more privileges and greater freedom. It is apparent, accordingly, that under modern practice the importance or necessity for the personal presence of the defendant is correspondingly minimized.

II. Existence of Right in State Practice.

To-day, trial by jury in criminal cases is guaranteed in the States by Constitutional provisions,[10] and the trial includes all of the proceedings through the rendition of the verdict. Moreover, there are generally provisions, Constitutional or statutory, which require the presence of the defendant during the trial in a felony case, and a few others, which require his presence at the rendition of the verdict.[11] In addition, the rule is firmly established that "in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in court",[12] or as Lord Hale[13] says: "In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given." This is uniformly construed to mean that in cases of felony the verdict must be delivered in the presence of the defendant in open court.[14] At common law, it seems that a valid judgment could not be predicated upon a verdict rendered in the absence of the defendant. Apparently, such a practice would savor of the characteristic of a judgment by default which has always been obnoxious to the criminal law.

With one or two exceptions,[15] in every State, where the question has been squarely raised, it has been adjudged that a defendant

[10]See note to case of Gore *v.* State (Ark. 1889) 5 L. R. A. 832, 835.

[11]*Cf.* Cooley, Const. Lim. (7th ed.) 452; also see California Penal Code § 1148; South Dakota, Code Criminal Procedure § 398; Texas, Code Criminal Procedure Art. 769.

[12]2 Co. Lit., 227, b.

[13]2 Hale, Pleas of the Crown, 300.

[14]Archbold, Criminal Pleading (24th ed.) 226; 1 Chitty, Criminal Law, *636; 2 Bishop, New Criminal Procedure (2nd ed.) 861; also *cf.* Harris, Criminal Law (3rd ed.) 382.

[15]One exception seems to be in New Jersey. See Jackson *v.* State (1887) 49 N. J. L. 252, 255. The court recognizes the common rule, but holds that the practice has become settled in the state to receive the verdict in all cases except capital cases without the presence of the defendant.

has the right to be present when the verdict is received in felony cases.[16] Practically all of the courts rest their decisions upon two grounds: first, that the defendant may face the jury and have the opportunity to poll it;[17] secondly, that he may be in the power of the court, and so subject to its judgment.[18] The right to poll the jury is an ancient one; the defendant has always been accorded the right to poll it personally or to have the court poll it.[19] Moreover, it has been said "that a Privy Verdict cannot be given in a Case of Felony; because the Jury are directed and ought in such Case to look upon the Prisoner when they give their Verdict."[20]

[16]In the following states it has been squarely held or announced in strong dictum that a defendant has a right to be present at the rendition of the verdict in felony cases: *Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin,* and *Wyoming.* Note the following cases arising in these states: Cook *v.* State (1877) 60 Ala. 39; Harris *v.* State (1907) 153 Ala. 19; Sneed *v.* State (1843) 5 Ark. *431; People *v.* Beauchamp (1874) 49 Cal. 41; *cf.* People *v.* Kohler (1855) 5 Cal. 72; Green *v.* People (1876) 3 Colo. 68; Smith *v.* People (1885) 8 Colo. 457; State *v.* Hurlbut (Conn. 1784) 1 Root 90; Lovett *v.* State (1892) 29 Fla. 356; *cf.* Holton *v.* State (1849) 2 Fla. 476; Nolan *v.* State (1875) 55 Ga. 521; Barton *v.* State (1881) 67 Ga. 653; Sahlinger *v.* People (1882) 102 Ill. 241; *cf.* Sewell *v.* People (1901) 189 Ill. 174; McCorkle *v.* State (1860) 14 Ind. 39; Harriman *v.* State (Iowa 1849) 2 Greene 370; *cf.* State *v.* Hutchinson (1895) 95 Iowa 566; State *v.* Way (1907) 76 Kan. 928; Temple *v.* Comm. (1879) 77 Ky. 769; State *v.* Ford (1878) 30 La. Ann. 311; *cf.* Hommer *v.* State (1897) 85 Md. 562; Comm. *v.* McCarthy (1895) 163 Mass. 458; Frey *v.* Calhoun Circuit Judge (1895) 107 Mich. 130; State *v.* Gorman (1911) 113 Minn. 401; Price *v.* State (1858) 36 Miss. 531; Sherrod *v.* State (1908) 93 Miss. 774; State *v.* Cross (1858) 27 Mo. 332; *cf.* State *v.* Smith (1886) 90 Mo. 37; *cf.* State *v.* Hawk (1899) 22 Mont. 33, 45; *cf.* Burley *v.* State (1871) 1 Neb. 385; *cf.* Territory *v.* Herrera (1901) 11 New Mex. 129; People *v.* Perkins (N. Y. 1828) 1 Wend. 91; State *v.* Jenkins (1881) 84 N. C. 812; Sargent *v.* State (1842) 11 Ohio 472; Rose *v.* State (1851) 20 Ohio 31; Lawson *v.* Territory (1899) 8 Okla. 1; *cf.* Humphrey *v.* State (1910) 3 Okla. Cr. 504; State *v.* Spores (1871) 4 Ore. 198; State *v.* Cartwright (1881) 10 Ore. 193; Prime *v.* Comm. (1851) 18 Pa. 103; Dougherty *v.* Comm. (1872) 69 Pa. 286; State *v.* France (Tenn. 1809) 1 Over. 434; Stewart *v.* State (Tenn. 1870) 7 Cold. 338; Percer *v.* State (1907) 118 Tenn. 765; Wyatt *v.* State (1906) 49 Tex. Cr. 193; *cf.* Jackson *v.* Comm. (Va. 1870) 19 Gratt. 656; Shapoonmash *v.* United States (1862) 1 Wash. Terr. 188; *cf.* State *v.* Greer (1883) 22 W. Va. 800; Stoddard *v.* State (1907) 132 Wis. 520; Trumble *v.* Territory (1889) 3 Wyo. 280. In a few of these and other states there is statutory provision for the defendant's presence upon the return of the verdict. See note 11.

[17]See Harriman *v.* State (Iowa) *supra*; Temple *v.* Comm. (Ky.) *supra*; People *v.* Perkins (N. Y.) *supra*; Sargent *v.* State (Ohio) *supra*; State *v.* Spores (Ore.) *supra.* (These cases are cited in note 16.)

[18]See Harris *v.* People (1889) 130 Ill. 457; Comm. *v.* McCarthy (Mass.) *supra,* note 16.

[19]*Cf.* Hommer *v.* State (1897) 85 Md. 562; Stewart *v.* People (1871) 23 Mich. 63; but see Comm. *v.* Roby (Mass. 1832) 12 Pick. 496, 513.

[20]5 Bac. Abr. (5th ed.) 283.

It is, of course, a matter of common knowledge that a certain psychical effect is produced upon the jurors by having them face the defendant when they return their verdict. Indeed, there have been instances recorded where a juror has changed his vote when polled by the defendant. Certainly, this is a commendable practice because it minimizes the danger of intimidation of a juror by his fellow-jurors or others.[21] It is obvious, therefore, that there might be a reason why this right to poll the jury should be protected, but only so far as is commensurate with other higher rights and compatible with reason.

Again, at common law and under modern practice, a judgment in a felony which involves corporal punishment cannot be passed upon a defendant in his absence.[22] At the early common law judgment was generally rendered immediately upon the return of the verdict; this was an added reason why the defendant's presence at the rendition of the verdict was required and preserved. The modern practice, however, is to pass judgment at any time subsequent to the delivery of the verdict. Therefore, this second reason for the defendant's presence no longer prevails.

Despite the fact that some of the reasons for the rule, with the expansion of the law, have ceased to exist,[23] it is, nevertheless, a well-settled and firmly rooted principle in our criminal jurisprudence that the defendant must be present when the verdict is rendered.[24] In capital cases the tendency is in the direction of a rigid enforcement of the rule, while in lesser felonies it is seldom relaxed. In *Temple* v. *Commonwealth*[25] the Kentucky court observed that:

"The presence of the accused is not a mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. . . . And at no time in the whole course of the trial is this right more valuable than at the final step when the

[21]See Sargent *v.* State, *supra*, note 16.

[22]1 Bishop, New Criminal Procedure (2nd ed.) 241; Harris *v.* People, *supra*, note 18; State *v.* Campbell (1896) 42 W. Va. 246; Rex *v.* Harris (1697) 1 Raym. 267. For a citation of other cases see Ball *v.* United States (1891) 140 U. S. 118, 129, in which there is a dictum by the Supreme Court to the effect that this is the general rule. *Cf.* Schwab *v.* Berggren (1892) 143 U. S. 442, 446, which affirms the above case.

[23]Beale, Criminal Pleading & Practice, § 213, where the author says: "It is evident, therefore, that the strict insistence on the defendant's presence has become a mere form, since in reality his rights are perfectly protected if he is represented by counsel."

[24]See notes 14 and 16.

[25](1879) 77 Ky. 769, 771.

jury are to pronounce that decision which is to restore him to the liberty of a citizen, or to consign him to the scaffold or to a felon's cell in the state prison."

The language used is, to be sure, rather strong. It might be seriously questioned to-day whether the presence of the defendant has not actually grown to be mere form. But in a New York Case, *Hinman* v. *People*,[26] the court in holding that a verdict cannot be received in a felony case in the absence of the defendant, likewise says:

"Receiving the verdict was one, if not the most important, of the proceedings during the trial. It must be received by the court before which the trial was had, and if not the verdict is a nullity, . . ."

On the other side of the question, the dictum of Knowlton, J., in the Massachusetts case of *Commonwealth* v. *McCarthy*[27] is noteworthy:

"This final act of the jury", says the learned Justice, "is nothing more than a formal announcement of the verdict of a trial which, up to that point, has proceeded with unquestionable regularity. There is no very important reason for requiring the defendant's presence then."

Yet it is interesting to note that the court was compelled by the overbearing weight of authority to adopt a contrary view. This dictum would seem to represent the better doctrine from the standpoint of strict reason and logic. Certainly the transformation from a time when a defendant was not allowed counsel to a period when all his interests are tenaciously guarded by experienced counsel and protected by the Constitution should effect a corresponding change in the common law technicalities which were designed to protect a defendant who was without these privileges. But the law, in this particular, remains inflexible, and the great weight of decisions sustain the view to the present day that a denial of the right to be present at the rendition of the verdict is reversible error.[28]

[26](1878) 13 Hun. 266, 268.

[27](1895) 163 Mass. 458, 460.

[28]The record must show that the defendant was present at the rendition of the verdict. Shapoonmash *v.* United States, *supra*, note 16. Moreover, if it shows that he was present at the beginning of the trial, his continued presence through the rendition of the verdict will be presumed. See State *v.* Swenson (1904) 18 S. D. 196; Sewell *v.* People (1901) 189 Ill. 174.

III. Waiver of Right.

There is a diversity of opinion on the question whether the right to be present can be waived.[29] At the outset, a theoretical distinction might be made if the right is considered as a constitutional right, on the one hand, or as a common law or statutory right, on the other hand. The mere fact, however, that it might be a constitutional right does not at all mean that it cannot be waived, for there are many constitutional rights that can be waived;[30] for instance there is good authority for the proposition that the right of trial by jury can be waived. Therefore, suppose the question is approached without regard to the origin of a right, for, after all, the same basic considerations which disallow a waiver of a constitutional right will apply to rights of other origin. The primary question always is whether the particular right is one adopted purely for the protection of public interests or merely for the security of individual interests.[31] Further, since nearly all laws are based more or less upon public interests, something more than this general attribute must exist to be the basis of disallowing a waiver, because to refuse it on that ground alone is to refuse it in every case.

Can the defendant himself waive the right? The better view, and the one which is supported by the weight of authority, is that in felonies less than capital the defendant may waive the right.[32] The only true benefit that a defendant derives from his

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[29]See 1 Bishop, New Criminal Procedure (2nd ed.) 238.

[30]See Henning *v.* State (1886) 106 Ind. 386, 393.

[31]*Cf.* Munson, The Extension of the Right of Waiver; 14 Columbia Law Rev. 571, 572; 1 Bishop, New Criminal Procedure (2nd ed.) 238.

[32]Beale, Criminal Pleading & Practice § 215. See also the following cases: Smith *v.* State (1877) 59 Ga. 513; State *v.* Kelly (1887) 97 N. C. 404; Hill *v.* State (1864) 17 Wis. 697; Sahlinger *v.* People, *supra* note 16; State *v.* Way, *supra* note 16; (aff'd. in State *v.* Bland (1913) 91 Kan. 160); Rose *v.* State, *supra* note 16; Stoddard *v.* State, *supra* note 16; Frey *v.* Calhoun Circuit Judge, *supra* note 16; Price *v.* State, *supra* note 16; McCorkle *v.* State, *supra* note 16; State *v.* Cherry (1911) 154 N. C. 624; State *v.* Gorman, *supra* note 16; Comm. *v.* McCarthy, *supra* note 16.

In Diaz *v.* United States, *infra* note 42, a case arising in the Phillipine Islands, the court applies what it concludes to be the prevailing law in the states. The Supreme Court expresses the opinion that in felonies less than capital the defendant may, under the state practice, waive the right to be present, and cites an abundance of state authority to this effect.

There is some authority in the states for the proposition that the defendant cannot waive the right to be present. *Cf.* Summeralls *v.* State (1896) 37 Fla. 162; Territory *v.* Lopez (1884) 3 New Mex. 104; State *v.* Mannion (1899) 19 Utah 505; State *v.* Sheppard (1901) 49 W. Va. 582; Maurer *v.* People (1870) 43 N. Y. 1, which however, seems to be weakened considerably by the later decision of People *v.* Bragle (1882) 88 N. Y. 585; Prime *v.* Comm., *supra* note 16 (but see as opposed to this view the case of

presence at the reception of the verdict is the privilege of facing the jury and polling it. But this is a right which is essentially personal; that is, it is exercisable purely at the volition of the defendant, for it is never attempted to force him either to look upon the jury or to poll it.[33] If the defendant were present when the verdict is received, no one would contend that he could not waive the right to poll the jury; in fact, his failure to insist on the privilege, operates of itself as a waiver. Therefore, in so far as the right to be present inures to any direct benefit to the defendant, there is no objection to permitting a waiver. The other necessity, public in character, for the defendant's presence is that judgment may be rendered against him.[34] But, as was pointed out, judgment can be passed and generally is, some time after the delivery of the verdict, and at a time when the defendant's presence may be secured. This difficulty is, therefore, obviated.

One authority says: "the objection to allowing universal waiver is substantially public, not altogether private. The public has an interest in the life and liberty of the accused person."[35] Doubtless this is true, but the argument applies with equal force against allowing a waiver of any right or privilege which the law gives. A great principle in the administration of justice is to give a defendant an opportunity to avail himself of certain privileges and benefits. The law should insist upon their exercise only in those instances where the great interests of the public demand certain fixed rules, or where there invariably exists that duress of circumstances which might unduly operate to take away a person's freedom of will or election. There is not apparent any great public interest in having the defendant present at the reception of the verdict. In fact, in the majority of cases in which the question

Lynch *v.* Comm. (1878) 88 Pa. 189). Also note the English case of Rex *v.* Streek (1826) 2 Car. & P. 413, which is a leading case often cited in support of the contention that a defendant cannot waive the right to be present at every part of the proceeding including the reception of the verdict. It seems to be the rule in the federal courts that a defendant cannot waive the right to be present at every stage of the trial, and this would seem to include the verdict. Hopt *v.* Utah (1884) 110 U. S. 574; Lewis *v.* United States (1892) 146 U. S. 370. In Georgia it has been held that a defendant may waive the right to be present at the rendition of the verdict even in a capital case. Cawthon *v.* State (1904) 119 Ga. 395.

[33]The weight of authority is that a defendant has not an absolute right to poll the jury. See State *v.* Colomb (1901) 108 La. 253; Comm. *v.* Roby (Mass. 1832) 12 Pick. 496, 513.

[34]See note 22, *supra.*

[35]1 Bishop, New Criminal Procedure (2nd ed.) 238.

arises, the interests of the public and the public peace, as well as protection to the defendant himself, demand that the defendant be kept away from the courtroom at that particular time. Moreover, his presence cannot be necessary to protect any interest which the defendant himself is not in a position to protect.

As the Georgia Court in *Smith* v. *State*[36] observes:

"Having surrendered his right to poll the jury, no other of any value to him remained, for the exercise or protection of which his presence was important. . . . Nothing took place in his absence, but the mechanical act of receiving the verdict, . . ."

Furthermore, if a defendant may waive his right to a trial altogether and plead guilty why may he not waive this less valuable right if he sees fit? The court in the Wisconsin case of *Hill* v. *State*,[37] says:

"It is clear that he may waive any trial at all. He may plead guilty, and thus subject himself to the worst results which might follow a trial. And if he can do this, it would be difficult to reconcile with the rule which allows it any reasoning that would prevent him from waiving any mere privilege on the trial that was designed only to aid him in shielding himself from those results."

This seems to be the sound and logical view. The few cases which hold to the contrary, are apparently based upon a dictum by Mr. Justice Harlan, in *Hopt* v. *Utah*,[38] where the learned justice, delivering the opinion of the court, says:

"That which the law makes essential in proceedings involving the deprivation of life, or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial, and in custody, to object to unauthorized methods."

It is evident from a review of the cases that this generalization does not state the law as it is developed in many subsequent decisions in the state courts.

In capital cases the prevailing view seems to be that the defendant cannot waive the right to be present.[39] The extreme leniency of the courts in this regard seems to be based upon the

[36](1877) 59 Ga. 513, 515.

[37](1864) 17 Wis. 697, 699.

[38](1884) 110 U. S. 574, 579.

[39]Lord Hale observes that: "In capital causes, whether upon indictment or appeal, no verdict can be given by default in the absence of the party." 2 Hale, Pleas of the Crown, 298. See also, Sherrod *v.* State, *supra* note 16; Diaz *v.* United States, *infra* note 42. In the former case there is an abundance of authority referred to by the court.

theory that every consideration should be exacted *"in favorem vitæ."* In a comparatively recent case in Mississippi, *State* v. *Sherrod,*[40] the court states, after an elaborate review of the authorities:

"Wherever the charge is a capital one, the courts have held uniformly, in *favorem vitæ,* that the defendant cannot waive his right to be present, and . . . it is fatal error to receive the verdict in his absence."

The *raison d'être* for this distinction in capital cases is hard to discern;[41] indeed, it seems to rest upon somewhat tenuous grounds. Possibly the only sound reason is to be found in a recent dictum by the United States Supreme Court in *Diaz* v. *United States*[42] in which the court, alluding to what the state courts have held, says:

"they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction."

The question so far has been discussed in connection with cases where the defendant is in custody. But suppose he is out on bail and fails to appear when the verdict is received. In such a case the courts almost unanimously hold that the verdict can be received in his absence and the reception of the verdict is not error.[43] The reason sometimes assigned for this result is that the defendant

[40](1908) 93 Miss. 774, 778.

[41]Mr. Munson, in 14 Columbia Law Rev. 571, 573, says: "There is no logic in treating a capital case differently from one not capital. . . ."

[42](1912) 223 U. S. 442, 455.

[43]Robson *v.* State (1889) 83 Ga. 166; Wilkerson *v.* State (1914) 14 Ga. App. 475; State *v.* Way (Kan.), *supra* note 16; Sahlinger *v.* People (Ill.) *supra* note 16 (aff'd in Gallagher *v.* People (1904) 211 Ill. 158, 171); State *v.* Wamire (1861) 16 Ind. 357; State *v.* Cherry, *supra* note 32; *cf.* State *v.* Guinness (1889) 16 R. I. 401; State *v.* Gorman, *supra* note 16; State *v.* Perkins (1888) 40 La. Ann. 210; Comm. *v.* McCarthy, *supra* note 16; Frey *v.* Calhoun Circuit Judge, *supra* note 16; Fight *v.* State (1835) 7 Ohio 327; *cf.* Lynch *v.* Comm., *supra* note 32. The contrary rule seems to prevail in Connecticut, Florida, and Tennessee. See State *v.* Hurlbut (Conn. 1784) 1 Root 90; Summeralls *v.* State, *supra* note 32; Andrews *v.* State (Tenn. 1855) 2 Sneed 550, 552. In the Tennessee case the court says: "If he be absent either in person or by escape, there is a want of jurisdiction over his person to proceed with the trial or to receive the verdict. . . ." This was the rule formerly in Arkansas, see Sneed *v.* State, *supra* note 16, but it was afterwards repudiated by statute. See Gore *v.* State (1889) 52 Ark. 285. In some states there is statutory provision for the reception of the verdict in the defendant's absence in case he absconds. See Missouri, § 1891 Revised Stat. of 1879, and the case of State *v.* Hope (1889) 100 Mo. 347; Arkansas, case of Gore *v.* State, *supra.*

cannot take advantage of his own wrong, and by voluntarily absenting himself, impede the due course of justice.[44] Assuming that the defendant cannot waive the right, this reasoning seems somewhat fallacious. If the right is one which the defendant cannot expressly waive, it is difficult to see how any conduct on his part can operate as an equivalent of waiver, or, what amounts to the same thing, to an implied waiver. The doctrine that a wrongdoer cannot take advantage of his own wrong finds little application in criminal law; few, if any, positive rights of a defendant in a criminal case can be lost by misconduct.

The majority of cases in this connection have rested their decisions upon the basis of a waiver,[45] and so fortify the view that a defendant may, in all events, make an express waiver of his right to be present. In *Sahlinger* v. *People*,[46] a leading case arising in Illinois, where a defendant was out on bail and absented himself when the verdict was returned, the court's opinion is that:

"The constitutional right of a prisoner to appear and defend in person . . . was conferred for the protection and the benefit of one accused of a crime, but, like many other rights, no reason is perceived why it may not be waived by the prisoner."

It must be noted, furthermore, that various dicta point to the distinction, heretofore made, that in capital cases the defendant's presence is required in every case and circumstance, and the fact that the defendant happens to be out on bond and not in custody would make no difference.[47] Of course, additional reasons, which do not obtain when he is in custody, may be found why a defendant who is not in custody should be allowed to waive the right in even capital cases. In the first place, the defendant could easily obstruct the due course of justice by absenting himself from the courtroom or by escaping when it became apparent that

[44]Falk *v.* United States (1899) 15 App. D. C. 446, in which the court, at page 460, remarks: "It is unfortunate, perhaps, that in several of the cases cited the fact of escape or absconding by an accused person under indictment; . . . , has been held to be a waiver of the right of the person to be present at the whole trial and of every stage of the trial. In our opinion, there is no question of waiver here of any right . . . Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong." See also Gore *v.* State, *supra* note 43; State *v.* Perkins, *supra* note 43.

[45]State *v.* Way, *supra*; Comm. *v.* McCarthy, *supra*; Frey *v.* Calhoun Circuit Judge, *supra*; McCorkle *v.* State, *supra*. (These cases will be found cited in note 16); State *v.* Cherry, *supra* note 32.

[46](1882) 102 Ill. 241, 246.

[47]*Cf.* People *v.* Beauchamp, *supra* note 16; Burley *v.* State, *supra* note 16; State *v.* Jenkins, *supra* note 16.

the verdict would possibly go against him. Then, again, there is not that constraint upon him to accede to proposals to waive his presence, which might possibly exist in cases where the defendant is incarcerated in jail. But this reasoning is too refined. If there are technical objections to allowing a waiver in capital cases, all cases of this class must stand or fall together, because mere considerations of convenience or policy in a particular case cannot explain away a technicality. Logically, waiver should be allowed in all felonies, capital or otherwise. Indeed, this view is supported by the United States Supreme Court in the recent case of *Frank* v. *Mangum* (decided April 15, 1915), where it was held that allowing a waiver in a capital case is not repugnant to the Due Process clause of the Fourteenth Amendment.

Suppose counsel, without the defendant's knowledge or assent, waives the defendant's right to be present. The weight of opinion seems to be that there is nothing in the general relation of attorney and client which gives implied authority to counsel to waive such a right.[48] The reasoning proceeds upon the broad theory that there is no implied authority in counsel to waive those rights which are designed for the general security of individual liberty as well as for the sole protection of the particular defendant. So far as the authorities show, this is the rule. A recent dictum, however, by the Georgia court, has weakened considerably this doctrine. In *State* v. *Frank*,[49] the court extends the doctrine of waiver to a case where a waiver was made by the defendant's counsel, and the defendant failed to object until a considerable time after the event. The court says:

"True, he had the right to conduct the trial in person, if he so desired; but the defendant committed his case to able and experienced counsel, who in the exercise of their relation as attorney to the client waived his right to be present, and they having made the waiver, and defendant by his counsel, having acquiesced in it, he should be bound by it."

Ample justification might certainly be found for this view. An attorney is supposed to be always on the alert to safeguard every

[48]There are numerous dicta, but few decisions, on this point. Waller *v.* State (1867) 40 Ala. 325; Smith *v.* People (1885) 8 Colo. 457, 458; see Green *v.* People (1876) 3 Colo. 68; Prime *v.* Comm., *supra* note 16; Lyons *v.* State (1909) 7 Ga. App. 50; *Cf.* Shipp *v.* State (1881) 11 Tex. App. 46; People *v.* Wilkes (N. Y. 1850) 5 How. Prac. 105 (this case arose under a statute which required the presence of the defendant or his attorney duly authorized for that purpose); also People *v.* Petry (N. Y. 1858) 2 Hilton 523.

[49](1914) 142 Ga. 741, 760.

possible interest of his client, and he should be better qualified to say what is for the best interests of the accused. As a matter of common practice, a defendant does very little active work on his case; the practice to-day is to leave every detail of the defence absolutely in the hands of counsel. In view of this custom no principle of agency would be in the way of implying the authority to waive.[50] Let this test be applied: Suppose the attorney advises his client to waive the privilege; is there any doubt but that there would scarcely ever be a case where a client would not follow the suggestion of counsel? Is there then anything anomalous in giving the attorney implied authority to do a certain thing when the invariable presumption is that the client, had he been consulted about the precise matter, would have readily assented? In other words, does not the client in such a case, impliedly assent to the act of counsel. From the general custom of committing the entire defence to the counsel, it seems that the client does. Nevertheless, the contrary rule finds the greater support in the cases.

To summarize, it might be added that the antiquity of a rule is but an earmark, certainly not an insurer, of its soundness. There is no special reason to-day why a defendant's presence should be required at the rendition of the verdict. The practice, however, has been followed from very remote times in legal history, and it affords a defendant at the present day an additional safeguard against possible abuse of power. Moreover, there is usually no difficulty in having the defendant present. It would seem, therefore, that there are no substantial objections to a preservation of the right. But certainly the defendant, or even his counsel, should be allowed in all cases, capital or lesser felonies, to waive a right which has grown to be much a matter of form.

IV. Effect of Violation of Right: Former Jeopardy.

Where a defendant has been denied the right to be present at the reception of the verdict, the question is presented whether he can be tried *de novo,* or whether the first trial can be set up as constituting double jeopardy. The point generally arises where there

[50] *Cf.* note 23.

has been no waiver or attempted waiver in any form, and the defendant is in the custody of the law.

Here, again, the authorities are not in harmony. The slight weight of authority, in jurisdictions where the question has been squarely raised, is that the defendant cannot be tried again under the rule prohibiting "double jeopardy."[51] The sound view, however, would seem to be represented by the cases holding the contrary.[52]

At the early common law there were only two pleas of this nature in bar to an indictment; the pleas of *"auterfois acquit"* and *"auterfois convict."* By these pleas a defendant sets up that he either has been previously acquitted or convicted of the same crime;[53] therefore, if the trial has ended without a verdict which can be recognized in law, neither plea is available. Originally, it was thought that the provision against "double jeopardy" only had reference to, and was an incorporation of, these two common law pleas, and nothing more; and so the principle "once in jeopardy" was construed to mean once in jeopardy by the verdict of a jury.[54] But the plea of "former jeopardy" under our system is distinct from these common law pleas; it is aimed to give a defendant an effective means by which to insure him the needed protection of certain rules and principles of the law, where otherwise he would have no adequate protection.[55]

In this particular instance, the rule of common law usually advanced in support of the view that "former jeopardy" is a good

[51]Cook *v.* State (1877) 60 Ala. 39; Harris *v.* State (1907) 153 Ala. 19 (at first, in Alabama the rule was that the defendant could be tried anew, see State *v.* Hughes (1841) 2 Ala. 102, but the later decisions in the state have repudiated this view); Nolan *v.* State (1875) 55 Ga. 521; *cf.* Hopkins *v.* State (1909) 6 Ga. App. 403; Finch *v.* State (1876) 53 Miss. 363; also *cf.* the note to the case of Upchurch *v.* State (Tex. 1896) 44 L. R. A. 694.

[52]State *v.* Jenkins (1881) 84 N. C. 812; Comm. *v.* Gabor (1904) 209 Pa. 201; State *v.* Hays (Tenn. 1879) 2 Lea 156.

[53]See Winsor *v.* Queen (1866) L. R. 1 Q. B. 390, 395 (in Exchequer Chamber); also note the opinion of Cockburn, C. J. in Regina *v.* Charlesworth (1861) 1 B. & S. *460, *507.

[54]See Winsor *v.* Queen (1866) L. R. 1 Q. B. 289, *311 (the first case); also note opinion by Cockburn, C. J., *supra* note 53.

[55]The constitutional provision against "double jeopardy" relates more to the beginning of the trial, and not to the end or result as the old plea of *"auterfois acquit"* or *"auterfois convict"* did. "Jeopardy" attaches with the empanneling of the jury and forbids within certain exceptions the discharge of the jury without a final verdict and determination of the cause according to law. *Cf.* Clark, Criminal Law (2nd ed.) 434; 1 Bishop, New Criminal Law (8th ed.) § 1043, *et seq.* For an interesting discussion and review of the cases under "double jeopardy" see note to the case of Comm. *v.* Fitzpatrick (Pa. 1888) 1 L. R. A. 451.

plea is that the jury cannot be discharged without a verdict.[56] As Lord Hale says:[57]

"By the antient law, if the jury sworn had been once particularly charged with a prisoner, . . ., it was commonly held they must give up their verdict, and they could not be discharged before their verdict given up, . . ."

In more recent times this rigid doctrine has been somewhat modified, and it is well settled that a jury can be discharged where a "legal necessity" exists for such a course, or where the defendant consents.[58] Where a verdict has been received in the enforced absence of the defendant, the argument is that the jury has been discharged without a "legal necessity" or the defendant's consent.[59] At once, it becomes apparent that this objection should not apply because the jury has, as a matter of fact, returned a verdict, and the rule that the jury could not be discharged logically applied only to those cases in which the discharge of the jury had prevented any verdict at all.[60] But the Georgia court in *Nolan* v. *State*,[61] attempts a rather cogent answer to this reasoning in the following fashion:

"What that jury thought of his guilt or innocence has not been authentically declared; and the jury having been discharged, in his enforced absence and without his consent, their opinion of his guilt or innocence can never be legally known."

Of course, in all these cases the jury has actually returned a verdict.[62] Any argument on the question of whether the verdict

[56]1 Wharton, Criminal Law (11th ed.) 519; 2 Bishop, New Criminal Procedure § 821. Lord Coke observes that: "If any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned, and sworn, their verdict must be heard, and they cannot be discharged, neither can the jurors in those cases give a privy verdict, but ought to give their verdict openly in court." See 3 Coke, Inst. *110.

[57]2 Hale, Pleas of the Crown, 294.

[58]1 Bishop, New Criminal Law (8th ed.) § 998; *cf.* People *v.* Cage (1874) 48 Cal. 323; Comm. *v.* Sholes (1866) 95 Mass. 554. For a good summary anticipating the law as it has been developed see State *v.* M'Kee (S. C. 1830) 1 Bailey 651, 654.

[59]See Finch *v.* State, *supra* note 51; *cf.* 2 Bishop, New Criminal Procedure (2nd ed.) § 821.

[60]*Cf.* note 56.

[61](1875) 55 Ga. 521, 525.

[62]It is interesting to compare, in this connection, the case of Rex *v.* Woodfall (1770) 5 Burr. 2661, 2668. The jury in this case, which was a prosecution for a criminal libel, returned a verdict of guilty, but the verdict was ambiguous as to the exact crime, of which the jury found the defendant guilty. It was urged that this amounted to an acquittal, but the court held otherwise and ordered a new trial with the observation that: "Clearly, there can be no judgment of acquittal because the fact found by the jury is the very crime they were to try."

be termed a legal one or otherwise, entails such subtlety of reasoning as falls more properly within the field of metaphysics. The proposition that what the jury thought of the defendant's guilt has not been authentically declared when a public verdict is rendered in the presence of the judge in open court is a perversion of the facts. True it may be that the law requires the defendant's presence, but this is an extrinsic matter, for the court was otherwise duly prepared to receive the verdict. To say that the verdict is not a legal one is to invoke a fiction to defeat the administration of justice, whereas fictions are properly resorted to only in the furtherance of justice. In all these cases the fact must remain that the jury has actually found the defendant guilty of the crime as charged.

Aside from legal refinement, what warrant can be found in the broad principles of justice, for turning free a defendant in face of a trial and conviction, otherwise regular and unimpeachable, because of a mere error of form? The principle back of the rule that the discharge of the jury without authority operates as an acquittal is to be found in the presumption of innocence raised in favor of a defendant. It is this, that the particular jury might find him innocent, and so the defendant is jeopardized by a premature discharge of the jury without a verdict. The fact that the jury did find the defendant guilty, although in a verdict extrinsically irregular, rebuts the presumption in this specific case. The presumption that the jury might not have convicted the defendant had he been present is counterbalanced by the fact that it did under the circumstances find him guilty. A dictum by the court in a Pennsylvania case, *Commonwealth* v. *Fitzpatrick*[63] is in point:

"The justice of sustaining a plea of former acquittal or conviction is unquestioned and unquestionable; but a plea of 'once in jeopardy' stands on narrow, more technical and less substantial grounds. It alleges only that there might have been a conviction or an acquittal, if the judge trying the cause had not made a mistake in law which prevented a verdict. It is of no consequence how many mistakes he makes, if the trial results in a conviction."

Further, in *State* v. *Hays*,[64] a Tennessee case, in which the general rule was repudiated, the court made the following reference to cases in which the plea of former jeopardy had been upheld:

"All proceed upon the hypothesis that at the time of the discharge

[63](1888) 121 Pa. 109, 117.

[64](Tenn. 1879) 2 Lea 156, 157.

of the juries there was a chance or probability, or at least a possibility, of acquittal. . . ."

Obviously, in the cases under discussion, the old plea of *"autrefois acquit"* could not be made, and there is no principle of law or justice upon which a plea of "once in jeopardy" can be supported. Indeed, the defendant's right to be present is adequately guarded, if the whole proceeding is declared null and void, and a trial *de novo* granted.

Another point might be observed. Assuming, as is contended, that the absence of the defendant vitiates a verdict, it is then, in legal contemplation, the same as if a verdict had not been rendered at all. It is always held that a court may discharge a jury without a verdict where a "legal necessity" exists. Such is the case where the jury is unable to agree and a mistrial is declared. In *United States* v. *Perez*,[65] the Supreme Court expresses the following opinion:

"We think, that in all cases of this nature, the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

In most of the cases where the defendant's absence is an enforced one, grave danger of hostile demonstrations by the populace or mob violence in case either of conviction or acquittal inspires the court to such action. But the jury has already reached a verdict; it has fulfilled its mission as a jury. If so, does not a "legal necessity" exist for its discharge? Public justice demands that the defendant should not be present in court, and yet the jury has completed its work. Suppose that the jury were discharged without a formal reception of a verdict, because of the inadvisability of securing the defendant's presence at that time:[66] There should be little question but that at most it would have the effect of a mistrial and the defendant could be tried again. If this is true, and the circumstances are the same, why should the added fact that a verdict was rendered change the situation, especially since the de-

[65] (1824) 9 Wheat. 579, 580; aff'd. in Thompson *v.* United States (1894) 155 U. S. 271.

[66] *Cf.* State *ex rel.* Battle (1845) 7 Ala. 259, which, however, was a slightly different case. Here the defendant escaped just before the jury were to return the verdict and the court ordered a mistrial and discharged the jury, although the jury had agreed upon a verdict. The court on appeal held that the defendant could be tried again.

fendant in his plea of "once in jeopardy" must allege and rest upon the fact that the verdict was null and void and of no effect?[67]

So far the question has been viewed in regard to a defendant who is in custody at the reception of the verdict and whose absence is an enforced one. Suppose the defendant is out on bail and voluntarily absents himself in a jurisdiction where the right cannot be waived. While a person may not waive his right to be present, it seems settled that he may waive any objection to a new trial, since he may waive the right to plead "former jeopardy".[68] If a jury is discharged with the defendant's concurrence, it acts as an implied waiver of the privilege of former jeopardy.[69] So, if a defendant seeks a reversal upon the ground of some error committed during the trial, he waives the privilege. Accordingly, it would seem that the defendant's absence at the time the verdict is to be delivered should operate as an implied consent to the discharge of the jury and as a waiver of "former jeopardy".[70] The same reasoning would seem to apply to a case where a defendant makes an express waiver in a jurisdiction where it is not allowed. However, there is little authority on this question.

V. Summary.

In final analysis, it may be said that *in felony cases the defendant should have the right to be present at the rendition of the verdict, but the defendant, or even his counsel, under his implied authority should be allowed to waive the right. Furthermore, a violation of the right should not be a bar to another trial.* To allow a plea of "former jeopardy" in such a case stamps the law with meaningless precision, and provides a means by which the due administration of justice is easily subverted.

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[67]In Andrews *v.* State (Tenn. 1855) 2 Sneed 550, 553, the court relied upon this latter fact as a basis for not sustaining a plea of former jeopardy. The court makes the following remark: "As to the nature and extent of the error, it was such as to vitiate the proceeding and render it, not voidable merely, but null and void; it being founded in a want of *jurisdiction* over the *person* of the accused at the time the verdict and judgment were rendered." The court then proceed to argue that, the entire proceedings being void, the defendant was not in jeopardy and it was not error to put him on trial a second time.

[68]1 Bishop, New Criminal Law (8th ed.) §§ 998, 1003; *cf.* State *v.* Barnes (1915) 29 N. D. 164.

[69]Clark, Criminal Law (2nd ed.) 435; also note 68.

[70]People *v.* Higgins (1881) 59 Cal. 357; Andrews *v.* State, *supra* note 67; 1 Bishop, New Criminal Law (8th ed.) § 998 (4).